

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALVARO SANCHEZ AGUILLAR,

Defendant.

NOS. CR-09-2057-RHW  
CV-10-3029-RHW

**ORDER DISMISSING  
DEFENDANT'S MOTION UNDER  
28 U.S.C. § 2255**

Before the Court is Defendant's *pro se* Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Ct. Rec. 40).

On July 7, 2009, Defendant plead guilty to Being an Alien in the United States Following Deportation and on the same day was sentenced to 18 months imprisonment and one-year supervised release. At the sentencing hearing, the Government and Defendant's counsel recommended that Defendant be sentenced to time served. The Court rejected the parties' recommendations and concluded that based on the number of prior deportations, as well as the fact that Defendant engaged in assaultive conduct toward his wife after he returned to the United States a sentence of 18 months was appropriate under 18 U.S.C. § 3553.

On June 8, 2010, Defendant filed *pro se* his Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Ct. Rec. 40). In his motion, Defendant presents four grounds for relief: (1) ineffective assistance of counsel in failing to object at sentencing to increased sentence and

1 breach of plea agreement; (2) actual innocence; (3) ineffective assistance of  
2 counsel in failing to object to aggravation of sentence for non-existent grounds;  
3 and (4) ineffective assistance of counsel in failing to file notice of appeal.

#### 4 **RULE 4 ANALYSIS**

5 Under 28 U.S.C. § 2255, the federal district court reviews the motion,  
6 attached exhibits, and the record of prior proceedings to determine if these  
7 documents “conclusively show that the prisoner is entitled to no relief.” 28 U.S.C.  
8 § 2255. If no relief is available, the petition is dismissed; otherwise, “the court  
9 shall cause notice thereof to be served upon the United States Attorney.” *Id.* Rule  
10 4(b) of the Rules Governing Section 2255 Proceedings provides that the court may,  
11 *sua sponte*, dismiss a § 2255 motion “[i]f it plainly appears from the face of the  
12 motion and any annexed exhibits and the prior proceedings in the case that the  
13 movant is not entitled to relief.” However, if the Court does not dismiss pursuant  
14 to Rule 4(b), the Court shall order the Government “to file an answer, motion, or  
15 other response within a fixed time, or to take other action the judge may order.”

#### 16 **INEFFECTIVE ASSISTANCE OF COUNSEL**

17 The underlying basis for three Defendant’s claims is ineffective assistance of  
18 counsel. To establish ineffective assistance of counsel, Defendant must show (1)  
19 that counsel's performance was deficient, and (2) that the deficient performance  
20 prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984);  
21 *United States v. Fry*, 322 F.3d 1198, 1200 (9<sup>th</sup> Cir. 2003). To satisfy *Strickland's*  
22 first prong, the acts or omissions must fall “outside the wide range of  
23 professionally competent assistance.” *Id.* at 690. The defendant must show “that  
24 counsel made errors so serious that counsel was not functioning as the ‘counsel’  
25 guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. A deficient  
26 performance prejudices a defense if there is “a reasonable probability that, but for  
27 counsel's unprofessional errors, the result of the proceeding would have been  
28 different.” *Id.* at 694. “A reasonable probability is a probability sufficient to

1 undermine confidence in the outcome.” *Id.* *Strickland's* second prong thus  
2 “requires showing that counsel's errors were so serious as to deprive the defendant  
3 of a fair trial, a trial whose result is reliable.” *Id.* at 687.

4 The Court starts from the presumption that Defendant’s counsel is  
5 “competent to provide the guiding hand that the defendant needs.” *United States v.*  
6 *Cronic*, 466 U.S. 648, 658 (1984); *see also Soppahthavong v. Palmateer*, 378 F.3d  
7 859, 868 (9<sup>th</sup> Cir. 2004), *quoting Strickland*, 466 U.S. at 690(“A court must  
8 scrutinize counsel's performance deferentially: ‘[C]ounsel is strongly presumed to  
9 have rendered adequate assistance and made all significant decisions in the  
10 exercise of reasonable professional judgment.’”).

11 Here, Defendant’s claims that his counsel was ineffective are meritless.  
12 First, Defendant alleges that his counsel should have objected to the breach of the  
13 plea agreement and failed to do so. However, the Government did not breach the  
14 plea agreement. As set forth above, pursuant to the parties’ agreement, the  
15 Government recommended a sentence of time served. Defendant’s counsel joined  
16 in that recommendation, and upon notice by the Court that it intended to sentence  
17 above the Guideline sentence, argued that this sentence was not warranted because  
18 Defendant’s wife intended to reconcile with Defendant and Defendant had an  
19 incentive to remain in Mexico.

20 Defendant now argues that he has a constitutional right to be sentenced  
21 according to the terms of the plea agreement. However, at the change of plea  
22 hearing, the Court specifically instructed Defendant that the Court did not have to  
23 follow the Guidelines or the parties’ recommendations and the Court had the  
24 authority to sentence Defendant to the maximum sentence. Defendant indicated  
25 that he understood this. Defendant has a right to enforce the plea agreement,  
26 although the Court notes that there was no written agreement between Defendant  
27 and the Government. Even so, it does not appear that either Defendant or the  
28 Government breached any agreement they had reached. Moreover, Defendant has

1 not shown that his defense was prejudiced by his counsel's performance.  
2 Defendant has not argued or shown that the Court erred in sentencing him to 18  
3 months.

4 Moreover, Defendant maintains that his sentence was increased based on  
5 non-existent grounds. Defendant maintains that his sentence was enhanced based  
6 on the grounds that there was reentry after deportation of an aggravated felony and  
7 asserts that his counsel should have objected to any increase of sentence based on  
8 this factor. This argument fails because the offense level was not increased based  
9 on the grounds that there was reentry after deportation of an aggravated felony.  
10 According to the PSIR, the final adjusted offense level was 6. There was no  
11 enhancement for any prior felonies.

12 Finally, Defendant alleges that he asked his counsel to file a notice of  
13 appeal. He reports that his counsel said for an additional \$1,000 he would file the  
14 notice of appeal and appeal. In a letter to the Court, Defendant's counsel indicated  
15 that he advised Defendant that if he wanted to appeal the court's decision to the  
16 Ninth Circuit, that counsel could either do it for him (for an additional fee), or if he  
17 did not have the money for an appeal, that counsel would contact the Federal  
18 public defenders for him to file an appeal without costs.<sup>1</sup> Counsel indicated that  
19 Defendant refused, saying that an appeal would take too long. Defendant cannot  
20 now say that his counsel failed to file a notice of appeal after Defendant directly  
21 instructed his counsel to not file the appeal.

#### 22 ACTUAL INNOCENCE

23 Defendant attempts to collaterally attack his prior deportations. He  
24 maintains that his prior convictions are only misdemeanors and asserts that he is  
25 entitled to remain in the United States unless he commits a felony offense.  
26 Defendant has waived his right to collaterally attack his prior deportations. At his

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27 <sup>1</sup>The Court notes that Defendant was initially represented by the Federal  
28 Defenders.

1 change of plea hearing, the Court specifically instructed Defendant that he had a  
2 right to look at his prior deportations to see if there was anything illegal about the  
3 deportation process. Defendant acknowledged this and knowingly waived his right  
4 to do so in this proceeding.

5 **CONCLUSION**

6 The Court has reviewed Defendant's petition and the record in this case.  
7 The Court concludes that Defendant has failed to show that he is entitled to relief.  
8 As such, his § 2255 motion is dismissed.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Defendant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or  
11 Correct Sentence by a Person in Federal Custody (Ct. Rec. 40) is **DISMISSED**.

12 2. The Court declines to issue a certificate of appealability. Defendant has  
13 not made a substantial showing of the denial of a constitutional right. 28 U.S.C. §  
14 2253(c)(2), nor has he shown that "reasonable jurists could debate whether . . . the  
15 petition should have been resolved in a different manner or that the issues  
16 presented were adequate to deserve encouragement to proceed further." *Slack v.*  
17 *McDaniel*, 529 U.S. 473, 484 (2000) (internal quotations omitted)

18 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
19 order and to provide copies to counsel.

20 **DATED** this 18<sup>th</sup> day of November, 2010.

21  
22 s/Robert H. Whaley

23 ROBERT H. WHALEY  
24 United States District Judge

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